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Tunas Manja Development & Construction (KL) Sdn Bhd v SPNB Aspirasi Sdn Bhd and another application

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C(ARB)-27–07 OF 2022 AND WA-24C(ARB)-31–07 OF 2022
ALIZA SULAIMAN J
4 SEPTEMBER 2023

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Arbitration — Award — Setting aside — Respondent applied to set aside award by arbitral tribunal — Whether arbitrator decided on issue which was not pleaded by applicant — Whether award in conflict with public policy of Malaysia

D

Civil Procedure — Judgments and orders — Setting aside — Setting aside of ex parte order — Respondent applied to set aside ex parte order granted pursuant to application by applicant to enforce award by arbitrator — Whether arbitrator decided on issue which was not pleaded by applicant — Whether award in conflict with public policy of Malaysia

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These two applications were heard together ie: (a) the application by SPNB Aspirasi Sdn Bhd ('SPNB') in OS 27 to set aside the ex parte order which was granted pursuant to the application by Tunas Manja Development & Construction (KL) Sdn Bhd ('Tunas Manja') to enforce the final award ('award') by the arbitrator ('setting aside application against the order'); and (b) the application by SPNB in OS 31 to set aside the whole of the award ('setting aside application against the award'). Tunas Manja was the beneficial proprietor of 469 pieces of land ('the lands'). Vide a letter to Tunas Manja Development & Construction (M) Sdn Bhd ('TMDC(M)'), SPNB expressed its interest to accept TMDC(M)'s proposal for 'Cadangan Pembangunan Perumahan Aspirasi Rakyat' on the lands. SPNB and Tunas Manja entered into a development agreement ('DA') to develop and construct 469 units of terrace houses on the lands ('the project'). Subsequently, SPNB and Tunas Manja entered into a supplementary development agreement ('SDA') to modify, substitute and/or vary the provisions of the DA to the extent and in the manner as provided in the SDA. Tunas Manja submitted its Interim Claim No 1 supported by the Interim Payment Certificate No 1 ('IPC No 1') in the amount of RM842,356.73. As no payment was forthcoming, Tunas Manja issued the notice of default to SPNB giving notice under cl 3.1 of the SDA for SPNB to rectify the breach of DA and SDA. The dispute between the parties culminated in the issuance of the notice of termination by Tunas Manja terminating the DA with immediate effect. Tunas Manja issued a notice of demand to SPNB

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pursuant to cl 3.1 of the SDA demanding the sum of RM23,842,771.20 as damages arising from the termination of the DA due to the purported breach of contract by SPNB. This was followed by the issuance of the notice to commence arbitration to SPNB. In the award, the arbitrator awarded Tunas Manja the sums of, inter alia: (i) RM25,231,284.11 for the loss of profit of the balance of work from the project; and (ii) RM935,951.92 in respect of IPC No 1 of the works done. Despite Tunas Manja's notice of demand to SPNB for payment of the amounts as stated in the award, SPNB failed to pay the said sums. Tunas Manja then instituted an originating summons for the award to be recognised as binding and be enforced. Tunas Manja's application was allowed ex parte. Hence, these application by SPNB. The issues for determination were: (A) whether the arbitrator had decided on an issue which was not pleaded by Tunas Manja ie that the issuance of the letter of intent to TMDC(M) was a typo error on the part of SPNB and thereby the award should be set aside ('the first ground'); and (B) whether the award was in conflict with the public policy of Malaysia as the award involved issues of fraud before the execution of the DA and the arbitrator did not have the authority/power to decide on such issues ('the second ground'); (C) because at the initial stage of the arbitration, the appointed counsel for SPNB ie Mohd Aiman bin Abdul Aziz ('Aiman') was, at the same time, practising under the name of Tunas Manja's firm of solicitors at the branch in Port Dickson, Negeri Sembilan ('the third ground'); (D) as there was a total failure by the arbitrator to analyse and appraise the relevant evidence presented by SPNB ('the fourth ground'); (E) as it constituted unjust enrichment by allowing for double recovery ('the fifth ground'); and (F) when the arbitrator, in awarding cost, had relied on external evidence adduced at the stage of submissions after the parties closed their case ('the sixth ground').

Held, dismissing the applications:

(1) A plain reading of the award showed that the learned arbitrator was only re-stating Tunas Manja's submission. Clearly, it was not a finding by the arbitrator. The arbitrator's analysis of the issue of fraudulent misrepresentation did not disclose any finding based on a typographical error. A proper analysis of the award dispelled any notion of an express finding or conclusion by the arbitrator as submitted by SPNB. The first ground of challenge against the award was devoid of any merit (see paras 46–47 & 49).

(2) Any objection or issue as to the arbitrator's jurisdiction must be raised before the arbitrator who was competent to rule on his jurisdiction. Issues on fraud could be decided by the arbitral tribunal. Moreover, the arbitration clause served as an independent agreement such that, even if the DA was null and void, the arbitration clause survived. The second ground on which SPNB had sought to set aside the award was similarly unmeritorious (see paras 54–55).

(3) SPNB's allegation of the occurrence of a breach of the rules of natural justice within the meaning of s 37(2)(b)(i) of the AA was not established for the following reasons: (a) SPNB's grievance was ventilated and decided in OS 11 and SPNB did not appeal against the decision of the court in dismissing the application with no order as to costs; and (b) SPNB's complaint did not fall within the ambit of the provisions of the AA which was relied upon. The arbitration proceedings were recommenced de novo when SPNB appointed Messrs Zulpadli & Edham and SPNB had fully-ventilated its case before the arbitral tribunal. Therefore, the third ground of challenge against the award had not been established (see paras 60–61).

(4) SPNB did not take the position that the arbitrator had denied SPNB the opportunity to present or ventilate its case fully. Rather, SPNB challenged the findings by the arbitrator which involved mixed findings of fact and law and was in the nature of an appeal. The fourth ground was nothing more than an attempt to attack the merits of the award under the guise of a purported breach of the rules of natural justice (see paras 63 & 65).

(5) It was clear from the SDA that in the event of termination of the DA/SDA by Tunas Manja, it may claim for liquidated ascertained damages equivalent to the entire loss of profits on the development costs and the cost and expenses of all works done and value of the materials at site. By allowing Tunas Manja's claim for RM935,951.92 for works done as per IPC No 1 and RM25,231,284.11 as loss of profit of the balance of work from the project, the arbitrator awarded what was bargained for by the parties in the event of default by SPNB. The parties must be held to the contract they made and it was not open to SPNB to renege on the clear and express terms of the contract. Therefore, SPNB's contention that there was unjust enrichment was simply unsubstantiated (see paras 68–70).

(6) SPNB's contention in the sixth ground was erroneous because the parties were given equal opportunities to submit on the issue of costs. By failing or refusing to make submissions on costs and to challenge the costs as sought by Tunas Manja, SPNB acted to its own peril. The arbitrator had addressed the matter on costs in the award by referring to Tunas Manja's submission as SPNB chose not to make any submission. Under these circumstances, SPNB's allegation of breach of the rules of natural justice in connection with the making of the award was completely baseless (see paras 73–74).

(7) As a natural consequence of the decision of the court to dismiss the setting aside application against the award, SPNB had similarly failed to

establish a meritorious case for the setting aside application against the order. There were no justifiable reasons to set aside the ex parte order (see paras 75–76).

[Bahasa Malaysia summary

Kedua-dua permohonan ini didengar bersama iaitu: (a) permohonan SPNB Aspirasi Sdn Bhd ('SPNB') dalam OS 27 untuk mengenepikan perintah ex parte yang telah diberikan menurut permohonan Tunas Manja Development & Construction (KL) Sdn Bhd ('Tunas Manja') untuk menguatkuasakan award akhir ('award') oleh penimbang tara ('permohonan mengenepikan perintah'); dan (b) permohonan SPNB dalam OS 31 untuk mengenepikan keseluruhan award ('permohonan mengenepikan award'). Tunas Manja adalah pemilik benefisial 469 bidang tanah ('tanah'). Melalui surat kepada Tunas Manja Development & Construction (M) Sdn Bhd ('TMDC(M)'), SPNB menyatakan minatnya untuk menerima cadangan TMDC(M) untuk 'Cadangan Pembangunan Perumahan Aspirasi Rakyat' di atas tanah tersebut. SPNB dan Tunas Manja memeterai perjanjian pembangunan ('DA') untuk membangunkan dan membina 469 unit rumah teres di atas tanah tersebut ('projek'). Selepas itu, SPNB dan Tunas Manja memeterai perjanjian pembangunan tambahan ('SDA') untuk mengubah suai, menggantikan dan/atau mengubah peruntukan DA setakat dan mengikut cara yang diperuntukkan dalam SDA. Tunas Manja mengemukakan Tuntutan Interim No 1 yang disokong oleh Sijil Pembayaran Interim No 1 ('IPC No 1') berjumlah RM842,356.73. Memandangkan tiada bayaran dibuat, Tunas Manja mengeluarkan notis keingkaran kepada SPNB memberikan notis di bawah klausa 3.1 SDA untuk SPNB membetulkan pelanggaran DA dan SDA. Pertikaian antara pihak memuncak dengan pengeluaran notis penamatan oleh Tunas Manja yang menamatkan DA berkuat kuasa serta-merta. Tunas Manja mengeluarkan notis tuntutan kepada SPNB menurut klausa 3.1 SDA menuntut jumlah RM23,842,771.20 sebagai ganti rugi yang timbul daripada penamatan DA akibat pelanggaran kontrak yang dikatakan oleh SPNB. Ini diikuti dengan pengeluaran notis untuk memulakan timbang tara kepada SPNB. Dalam award itu, penimbang tara menganugerahkan Tunas Manja jumlah, antara lain; (i) RM25,231,284.11 untuk kehilangan keuntungan baki kerja daripada projek itu; dan (ii) RM935,951.92 berkenaan dengan IPC No 1 daripada kerja yang dilakukan. Meskipun dengan notis tuntutan Tunas Manja kepada SPNB untuk pembayaran jumlah seperti yang dinyatakan dalam award tersebut, SPNB gagal membayar jumlah tersebut. Tunas Manja kemudiannya memulakan saman pemula untuk award itu diiktiraf sebagai mengikat dan dikuatkuasakan. Permohonan Tunas Manja dibenarkan secara ex parte. Oleh itu, permohonan ini oleh SPNB. Isu-isu untuk penentuan adalah: (A) sama ada penimbang tara telah memutuskan isu yang tidak dirayu oleh Tunas Manja iaitu pengeluaran surat niat kepada TMDC(M) adalah kesilapan ejaan di pihak SPNB dan dengan itu award hendaklah diketepikan ('alasan pertama'); (B) sama ada award itu bercanggah dengan dasar awam Malaysia

memandangkan award itu melibatkan isu penipuan sebelum pelaksanaan DA dan penimbang tara tidak mempunyai autoriti/kuasa untuk memutuskan isu tersebut ('alasan kedua'); (C) kerana pada peringkat awal timbang tara, peguam yang dilantik untuk SPNB iaitu Mohd Aiman bin Abdul Aziz ('Aiman') pada masa yang sama, menjalankan amalan di bawah nama firma peguamcara Tunas Manja di cawangan di Port Dickson, Negeri Sembilan ('alasan ketiga'); (D) kerana terdapat kegagalan sepenuhnya oleh penimbang tara untuk menganalisis dan menilai keterangan berkaitan yang dikemukakan oleh SPNB ('alasan keempat'); (E) kerana ia merupakan pengayaan tidak adil dengan membenarkan pemulihan berganda ('alasan kelima'); dan (F) apabila penimbang tara, dalam menganugerahkan kos, telah bergantung pada keterangan luar yang dikemukakan pada peringkat penghujahan selepas pihak-pihak menutup kes mereka ('alasan keenam').

Diputuskan, menolak permohonan:

(1) Bacaan jelas award itu menunjukkan bahawa penimbang tara yang bijaksana hanya menyatakan semula penghujahan Tunas Manja. Jelas sekali, ia bukan penemuan oleh penimbang tara. Analisis penimbang tara terhadap isu salah nyata palsu tidak mendedahkan sebarang penemuan berdasarkan kesilapan tipografi. Analisis yang betul ke atas award itu menepis sebarang tanggapan mengenai penemuan atau kesimpulan yang jelas oleh penimbang tara seperti yang dikemukakan oleh SPNB. Alasan pertama cabaran terhadap award itu adalah tanpa sebarang merit (lihat perenggan 46–47 & 49).

(2) Sebarang bantahan atau isu mengenai bidang kuasa penimbang tara mesti dibangkitkan di hadapan penimbang tara yang kompeten untuk memutuskan bidang kuasanya. Isu mengenai penipuan boleh diputuskan oleh tribunal timbang tara. Selain itu, klausa timbang tara berfungsi sebagai perjanjian bebas supaya, walaupun DA batal dan tidak sah, klausa timbang tara itu kekal. Alasan kedua di mana SPNB telah berusaha untuk mengetepikan award itu juga tidak bermerit (lihat perenggan 54–55).

(3) Dakwaan SPNB tentang berlakunya pelanggaran peraturan keadilan semula jadi dalam pengertian s 37(2)(b)(i) AA tidak dibuktikan atas sebab-sebab berikut: (a) rungutan SPNB telah diutarakan dan diputuskan dalam OS 11 dan SPNB tidak merayu terhadap keputusan mahkamah yang menolak permohonan itu tanpa perintah mengenai kos; dan (b) aduan SPNB tidak termasuk dalam lingkungan peruntukan AA yang disandarkan. Prosiding timbang tara telah dimulakan semula secara de novo apabila SPNB melantik Tetuan Zulpadli & Edham dan SPNB telah mengutarakan sepenuhnya kesnya di hadapan tribunal timbang tara. Oleh itu, alasan ketiga cabaran terhadap award itu tidak dibuktikan (lihat perenggan 60–61).

(4) SPNB tidak mengambil pendirian bahawa penimbang tara telah menafikan peluang SPNB untuk membentangkan atau mengutarakan kesnya sepenuhnya. Sebaliknya, SPNB mencabar dapatan penimbang tara yang melibatkan penemuan bercampur fakta dan undang-undang dan berbentuk rayuan. Alasan keempat adalah tidak lebih daripada percubaan untuk menyerang merit award dengan berselindung sebagai pelanggaran yang dikatakan terhadap peraturan keadilan semula jadi (lihat perenggan 63 & 65).

(5) Adalah jelas daripada SDA bahawa sekiranya berlaku penamatan DA/SDA oleh Tunas Manja, ia boleh menuntut ganti rugi yang dipastikan bersamaan dengan keseluruhan kehilangan keuntungan atas kos pembangunan dan kos dan perbelanjaan semua kerja selesai dan nilai bahan di tapak. Dengan membenarkan tuntutan Tunas Manja sebanyak RM935,951.92 untuk kerja-kerja yang dilakukan mengikut IPC No 1 dan RM25,231,284.11 sebagai kehilangan keuntungan baki kerja daripada projek itu, penimbang tara menganugerahkan apa yang telah ditawar oleh pihak-pihak sekiranya berlaku keingkaran oleh SPNB. Pihak-pihak mesti berpegang kepada kontrak yang mereka buat dan ia tidak terbuka kepada SPNB untuk mengingkari terma kontrak yang jelas dan nyata. Oleh itu, dakwaan SPNB bahawa terdapat pengayaan yang tidak adil adalah tidak berasas (lihat perenggan 68–70).

(6) Pertikaian SPNB dalam alasan keenam adalah salah kerana pihak-pihak diberi peluang yang sama untuk mengemukakan isu kos. Dengan gagal atau enggan membuat penghujahan mengenai kos dan mencabar kos seperti yang dipohon oleh Tunas Manja, SPNB bertindak atas risikonya sendiri. Penimbang tara telah menangani perkara itu mengenai kos dalam award dengan merujuk kepada penghujahan Tunas Manja kerana SPNB memilih untuk tidak membuat sebarang penghujahan. Di bawah keadaan ini, dakwaan SPNB melanggar peraturan keadilan semula jadi berkaitan dengan pembuatan award adalah tidak berasas sama sekali (lihat perenggan 73–74).

(7) Sebagai akibat semula jadi daripada keputusan mahkamah untuk menolak permohonan mengenepikan award itu, SPNB juga telah gagal untuk mewujudkan kes bermerit untuk mengenepikan permohonan terhadap perintah itu. Tiada alasan yang wajar untuk mengenepikan perintah ex parte (lihat perenggan 75–76).]

Cases referred to

Ashville Investment Ltd v Elmer Contractors Ltd [1988] 2 All ER 577, CA (refd)
A Ayyasamy v A Paramasivam and Others [2016] 7 MLJ 396 (refd)
Boon Chang (M) Eng v Tejana Trading Corp Sdn Bhd & Ors [1999] MLJU 686, HC (refd)

Capital Insurance Bhd v Wierig Prefab (Selangor) Sdn Bhd [2003] 1 MLJ 449, HC (refd)
Cunningham-Reid and another v Buchanan-Jardine [1988] 2 All ER 438, CA (refd)
Darshan Singh Khaira v Majlis Peguam Malaysia [2021] 5 MLJ 921; [2021] 10 CLJ 497, FC (refd)
M101 Entity Sdn Bhd v Geopancar Sdn Bhd and another case [2022] MLJU 1354, HC (refd)
Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan and another Summon [2020] MLJU 660; [2020] MLRHU 483, HC (refd)
Ketua Setiausaha Kementerian Dalam Negeri & Anor v Salconmas Sdn Bhd [2022] 6 MLJ 836; [2022] MLRAU 152, CA (refd)
Kris Heavy Engineering & Construction Sdn Bhd v EP Engineering Sdn Bhd [2019] MLJU 1928; [2019] MLRHU 1536, HC (refd)
Lee Kam Sun v Ho Sau Lin & Anor [1999] 4 MLJ 509; [1999] 4 CLJ 507, HC (refd)
Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307, FC (refd)
Ng Siew Lan v John Lee Tsun Vui & Anor [2017] 2 MLJ 167; [2017] 2 CLJ 245, FC (refd)
Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal [2021] 1 MLJ 1; [2020] 6 MLRA 124, FC (refd)
Permodalan MBF Sdn Bhd v Tan Sri Dato' Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178, SC (refd)
Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] CLJ 1, FC (refd)
Propel Synergy Sdn Bhd v Vistasik Sdn Bhd and another case [2022] MLJU 824; [2022] 1 LNS 790, HC (refd)
SJIC Bina Sdn Bhd v Iskandar Regional Development Authority and another case [2020] MLJU 2366, HC (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289; [1998] 3 CLJ 85, CA (refd)
Sunway Creative Stones Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd and another summons [2020] MLJU 658; [2021] 2 MLRH 78, HC (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 10, 13, 14, 15, 16(3), 21, 21(1), (2), 33(6), 36(1), 37, 37(1)(a)(v), (1)(a)(vi), (1)(b)(ii), (2), (2)(b), (6), 38, 39, 41, 44,
Rules of Court 2012 O 69, O 69 rr 2, 2(1), 4, 5, 7, 8(7), 10,

Pook Fong Fee (with Aswath a/l Ramakrishnan) (Ahmad Deniel, Ruben & Co) in Originating Summons No WA-24C(ARB)-27–07 of 2022 for the applicant.
Abdullah Az-Zubayr bin Awaluddin (with Ashmadi Othman) (Zulpadli &

Edham) in Originating Summons No WA-24C(ARB)-31–07 of 2022 for the plaintiff.

Pook Fong Fee (with Aswath a/l Ramakrishnan) (Ahmad Deniel, Ruben & Co) in Originating Summons No WA-24C(ARB)-31–07 of 2022 for the defendant.

Abdullah Az-Zubayr bin Awaluddin (with Ashmadi Othman) (Zulpadli & Edham) in Originating Summons No WA-24C(ARB)-27–07 of 2022 for the respondent.

Aliza Sulaiman J:

INTRODUCTION

[1] Two applications were heard together in this court with the consent of the parties, namely:

(a) the application by SPNB Aspirasi Sdn Bhd ('SPNB') in Originating Summons No WA-24C(ARB)-27–07 of 2022 ('OS No 27') to set aside the ex parte order dated 9 August 2022 under O 69 r 8(7) of the Rules of Court 2012 ('the ROC 2012'), s 39 of the Arbitration Act 2005 (Act 646) ('the AA 2005') and/or within the existing and/or implied jurisdiction of the court, which was granted pursuant to the application by Tunas Manja Development & Construction (KL) Sdn Bhd ('Tunas Manja') to enforce the final award dated 29 June 2022 ('award') by the learned arbitrator, Datuk Sundra Rajoo ('setting aside application — order'); and

(b) the application by SPNB in OS No WA-24C(ARB)-31–07 of 2022 ('OS No 31') to set aside the whole of the award pursuant to sub-paras 37(1)(a)(v), 37(1)(a)(vi) and 37(1)(b)(ii), and para 37(2)(b) of the AA 2005, O 69 r 5 of the ROC 2012 and/or within the existing and/or implied jurisdiction of the court ('setting aside application — award').

[2] After having considered the affidavit evidence and submissions by the parties, the court dismissed both the setting aside application — award and the setting aside application — order with costs of RM20,000 and RM10,000, respectively. Both orders as to cost are subject to allocatur.

[3] SPNB is aggrieved with the decisions of this court as aforesaid. I now provide my full grounds for the decisions as pronounced.

THE CAUSE PAPERS

[4] The cause papers in relation to the applications are as follows:

(a) OS No 27: setting aside application — order:

(i) SPNB's notice of application dated 26 August 2022 (encl 7);

(ii) SPNB's affidavit in support ('AIS') affirmed by its senior manager, Fadzli Haris @ Fadhli Hanafi bin Pauzi on 26 August 2022 (encls 8–15);

(iii) Tunas Manja's affidavit in reply ('AIR') affirmed by its Director, Rusli bin Ismail on 11 September 2022 (encl 17); and

(iv) SPNB's AIR affirmed by the same deponent on 26 September 2022 (encl 18);

(b) OS No 31: setting aside application — award:

(i) SPNB's OS dated 29 July 2022 (encl 1);

(ii) SPNB's AIS affirmed by the same deponent on 28 July 2022 (encls 2–9);

(iii) Tunas Manja's AIR affirmed by the same deponent on 30 August 2022 (encl 14);

(iv) SPNB's AIR affirmed by the same deponent on 13 September 2022 (encl 16); and

(v) Tunas Manja's notice of intention to use affidavit (encl 2 in OS No 27 and all other affidavits in OS No 31) dated 22 September 2022 (encl 18).

SALIENT BACKGROUND FACTS

[5] SPNB is a private limited company incorporated under the laws of Malaysia with its registered and business addresses at 84–1, Jalan Wangsa Delima 6, Pusat Bandar Wangsa Maju (KLSC), 53300 Kuala Lumpur (see the search as at 16 August 2022 made with the Companies Commission of Malaysia ('SSM') in exh 'FH2', AIR, encl 15).

[6] SPNB is wholly owned by Sykt Perumahan Negara Bhd and is engaged in the business of property development, construction and project manager.

[7] SPNB is entrusted with the responsibility of developing and providing affordable housing accommodation in Malaysia to meet the housing requirements of the public particularly within the lower and middle-income group.

[8] Tunas Manja is similarly a private limited company incorporated under the laws of Malaysia on 23 March 2015. Its registered address is No 9, Jalan 1/114, Kuchai Business Centre, Off Jalan Kuchai Lama, 58200 Kuala Lumpur and its office address is 40–2, Jalan Kuchai Maju 10, 58200 Kuala

Lumpur (see the SSM search as at 24 February 2021 in exh 'FH1', AIS, encl 2). A

[9] The nature of Tunas Manja's business is the development of building projects for own operation and IE for renting of space in these buildings.

[10] Tunas Manja is the beneficial proprietor of 469 pieces of land held under Mukim Kuala Kuantan, District of Kuantan, State of Pahang which were subdivided from the previous Master Titles held under Lot 2425 and Lot 2696, Batu 11, Jalan Gambang, District of Kuantan, State of Pahang ('lands'). B C

[11] Vide a letter dated 6 May 2015 ('LoI') to Tunas Manja Development & Construction (M) Sdn Bhd ('TMDC(M)'), SPNB expressed its interest to accept TMDC(M)'s proposal for 'Cadangan Pembangunan Perumahan Aspirasi Rakyat' on the lands. D

[12] On 15 December 2015, SPNB and Tunas Manja entered into a development agreement (third party charge financing) ('DA') to develop and construct 469 units of terrace houses on the lands ('project'). E

[13] Clause 2 of the DA provides that, in consideration of Tunas Manja agreeing to carry out the project, SPNB covenants to pay Tunas Manja the total development costs in the sum of RM108m ('development costs') comprising the land cost of RM33m ('land cost') and the construction cost of RM75m ('construction cost') (see too, cl 5 of the DA on 'PAYMENT OF DEVELOPMENT COSTS'). F

[14] Subsequently, SPNB and Tunas Manja entered into a supplementary development agreement dated 12 December 2017 ('SDA') to modify, substitute and/or vary the provisions of the DA to the extent and in the manner as provided in the SDA. G

[15] In the course of the contractual relationship, Tunas Manja had claimed and received RM33m for the land cost.

[16] On 29 July 2019, Tunas Manja submitted its Interim Claim No 1 supported by the Interim Payment Certificate No 1 ('IPC No 1') as certified by the architect for the project. The amount which was certified in IPC No 1 is RM842,356.73 (RM886,216.62 consultant fees + RM49,735.30 government contribution fees = RM935,951.92 less retention sum of RM93,595.19). H I

[17] As no payment was forthcoming, Tunas Manja issued the notice of default to SPNB on 10 September 2019 giving notice under clause 3.1 of the SDA for SPNB to rectify the breach of the DA and SDA within 14 days from

the date of receipt of the notice of default.

[18] The dispute between the parties culminated in the issuance of the notice of termination by Tunas Manja on 30 September 2019 terminating the DA with immediate effect.

[19] On 17 December 2019, Tunas Manja's solicitors, Messrs Ahmad Deniel, Ruben & Co ('Messrs ADR') issued a notice of demand to SPNB pursuant to cl 3.1 of the SDA demanding the sum of RM23,842,771.20 (RM935,951.92 Interim Claim No 1 + RM22,906,819.28 loss of profit) as damages arising from the termination of the DA due to the purported breach of contract by SPNB.

[20] This was followed with the issuance of the notice to commence arbitration to SPNB dated 23 June 2020 in accordance with the arbitration agreement in cl 22 of the DA (see the statement of claim dated 10 February 2021 for the details of Tunas Manja's claims in the arbitration proceedings).

[21] The Tribunal was validly and properly constituted on 16 August 2020 when Datuk Sundra Rajoo informed both parties of his acceptance of the appointment as the arbitrator and that there was no conflict for him to act as the arbitrator.

[22] In the award, the arbitrator ultimately determined as follows:

> XX final award
>
> NOW, FOR THE REASONS GIVEN, I, DATUK SUNDRA RAJOO, HEREBY FIND, DETERMINE, DECLARE AND award THAT:
>
> (1) The Claimant's termination of the development agreement dated 15th December 2015 and the Supplementary development agreement dated 12th December 2017 on 30th September 2019 was valid and lawful.
>
> (2) The Respondent pay to the Claimant the sum of RM25,231,284.11 for the loss of profit of the balance of work from the Project.
>
> (3) The Respondent pay to the Claimant the sum of RM935,951.92 in respect of Interim Payment Certificate No.1 of the work done.
>
> (4) The Respondent pay the Claimant's costs in this arbitration in the sum of RM713,958.52.
>
> (5) The Respondent pay interest at the rate of 5% per annum on the sum of RM25,231,284.11 and RM935,951.92 awarded in sub-paragraphs (2) and (3) at above from the date of termination of 30th September 2019 until the date of full realisation of the payment.

(6) The Respondent pay interest at the rate of 5% per annum on the sum of RM713,958.52 awarded in sub-paragraph (4) above from date of this final award until the date of full realisation of the payment.

(7) All other claims and requests made and/or reliefs sought in this arbitration are dismissed.

[23] Despite Tunas Manja's notice of demand to SPNB for payment of the amounts as stated in the award, SPNB failed to pay the said sums. Tunas Manja then instituted OS No 27 for the award to be recognised as binding and be enforced by entry as a judgment in terms of the award pursuant to s 38 of the AA 2005. This court allowed Tunas Manja's application and granted the ex parte order on 9 August 2022.

OS NO WA-24C(ARB)-31–07 OF 2022: THE SETTING ASIDE APPLICATION — AWARD

[24] Among the provisions cited in OS No 31 to support SPNB's application to set aside the award are sub-paras 37(1)(a)(v), 37(1)(a)(vi) and 37(1)(b)(ii), and para 37(2)(b) of the AA 2005 which read as follows:

37 Application for setting aside

(1) An award may be set aside by the High Court only if —

(a) the party making the application provides proof that —

...

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that —

...

(ii) the award is in conflict with the public policy of Malaysia.

(2) Without limiting the generality of sub-paragraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where —

...

(b) a breach of the rules of natural justice occurred —

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from

those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[25] SPNB submitted that the award should be set aside for the following reasons:

(a) the arbitrator had decided issues which were not pleaded by Tunas Manja as held that the issuance of the LoI to TMDC(M) was merely an error committed on behalf of SPNB;

(b) the arbitrator had no authority and/or power to decide on serious issues of fraud as to how Tunas Manja had obtained the project;

(c) the award constitutes an unjust enrichment as Tunas Manja was not only awarded the costs incurred for construction but was also awarded loss of profits which amounts to a double claim;

(d) in awarding costs, the arbitrator had relied on external evidence which was only adduced at the submissions stage after the parties had closed their case. SPNBA was denied the right to cross-examine and/or refute the alleged costs as claimed by Tunas Manja;

(e) in the early stages, SPNB was represented by a solicitor who was practicing in the same name and style as Tunas Manja's solicitors. Thus, there was a clear conflict of interest as SPNB and Tunas Manja was represented by the same solicitors; and

(f) there was a serious and/or total failure to analyse and appraise the relevant evidence presented by SPNB which had gone on to affect the award.

[26] SPNB had decided not to pursue the grounds that the arbitrator had exceeded his authority under sub-paras 37(1)(a)(v) and/or para 37(2)(b) of the AA 2005 when he allegedly changed the terms and conditions of the DA and that there is a denial of natural justice when the arbitrator purportedly did not consider SPNB's defence and evidence in making a decision (see the letter from SPNB's solicitors to the court dated 24 November 2022 and as a result, sub-paras 53.5, 53.8 and 53.10 of the AIS and sub-para 7.7 and paras 67–74 of SPNB's written submission were not taken into consideration).

The legal principles

[27] In *Propel Synergy Sdn Bhd v Vistasik Sdn Bhd and another case* [2022] MLJU 824; [2022] 1 LNS 790 (affirmed by the Court of Appeal on 7 November 2022 and motion for leave to appeal to the Federal Court was dismissed on 15 May 2023), this court summarised the relevant statutory provisions in the AA 2005 and the application of these provisions as distilled

from the case authorities in the following words:

> [29] An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties (see sub-s 36(1) AA 2005).
>
> [30] Section 8 AA 2005 limits the intervention by the court in matters governed by the AA 2005 to strictly such matters as expressly provided in the Act itself. Hence, an arbitral award cannot be challenged except on the limited grounds as enumerated in s 37 AA 2005. This is consistent with the minimalistic approach in intervention in arbitration and arbitration related matters (see *Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd and another case* [2015] 11 MLJ 841).

[28] In the instant case, SPNB bears the burden of proving its grounds of challenge against the award on the balance of probabilities.

[29] In relation to sub-paras 37(1)(a)(v) and 37(1)(a)(vi) AA 2005, I again turn to *Propel Synergy* where this court said:

> [35] With regards to sub-para 37(1)(a)(v) AA 2005, in determining whether the arbitrator has decided on matters beyond the scope of the submission to arbitration, the Court of Appeal in *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* [2018] 3 MLJ 608 held that the points of claim, defences and replies in an arbitration are akin to pleadings in a civil suit and as such, the 'pleadings' at the arbitration define the disputes between the parties and the extent of jurisdiction and submission to the jurisdiction of the arbitrator. In para 85 of the judgment, the court said that 'Not only do these pleadings define the dispute(s) that are referred to arbitration, more importantly, the arbitrator takes his mandate and authority from those pleadings insofar as what is required for his determination. The arbitrator cannot exceed those terms of reference or limits of submission which have been demarcated by consensual agreement between the parties. Otherwise, these breaches may become the basis of setting aside of awards under other provisions of s 37(1)(a) of Act 646.
>
> [36] If the arbitral tribunal had improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it, the award may be susceptible to be set aside under sub-para 37(1)(a)(v) AA 2005 (see *The Government of India v Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149). That provision is expressed to be subject to sub-s 37(3) of the same Act. This means that those parts of the award which contain decisions on matters which had not been submitted to arbitration may be set aside where those parts are capable of being severed from the other parts of the award which deals with matters falling within the scope of the submission to arbitration.
>
> [37] Erroneous interpretations of the law and of the facts are not grounds on which the courts can set aside an award under sub-para 37(1)(a)(v) AA 2005 (see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41).
>
> ...
>
> [38] Subsection 21(1) of the AA 2005 provides that 'Subject to the provisions of this Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings'. In the textbook referred to earlier,

A UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 (Amended 2011 & 2018) and the AIAC Arbitration Rules 2018 (at pp 371–372), the learned author illuminated that this sub-section allows the parties the freedom to determine the procedure applicable to the arbitration, subject to the provisions of the AA 2005. The provisions of the AA 2005 which restrict party autonomy relate B to the fundamental principles of fairness as found in ss 20, 29 and 35 and sub-s 21(3), 25(1) and 26(3), (4) and (5).

...

[41] *The Singapore Court of Appeal in CRW Joint Operation v PT Perusahaan Gas* C *Negara (Persero) TBK* [2011] 4 SLR 305 at pp 320–321 held that a '... mere failure by an arbitrator to act as efficiently as he might or a minor divergence from procedural rules established by the parties is not of itself sufficient to justify a remedy for breach of the rules of natural justice. An arbitrator is perfectly entitled to adhere to procedural rules agreed by the parties or adopted by the arbitrator himself within his powers ...'. D

[30] SPNB claimed that the arbitral procedure was not in accordance with the agreement of the parties because the award contains decisions on matters beyond the scope of the submission to arbitration ie relating back to E sub-para 37(1)(a)(v) of the AA 2005.

[31] The bulk of SPNB's arguments was premised on sub-paras 37(1)(b)(ii) and 37(2)(b)(i) and (ii) of the AA 2005, which requires an appreciation of when an award can be said to be 'in conflict with the public policy of Malaysia' F and the concept of a breach of the rules of natural justice occurring during the arbitral proceedings or in connection with the making of the award. The applicable legal principles were also dealt with in the following excerpt from the judgment in *Propel Synergy*:

[42] In *Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan* G *and another Summon* [2020] MLJU 660; [2020] MLRHU 483, this court had referred to the decision in *Sigur Ros* wherein the Court of Appeal had agreed with the views expressed by the earlier panel in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403, namely —

[39] ... H

(a) where the award conflicts with the public policy of Malaysia for the reason of there being a breach of the rules of natural justice, it is the whole award which will be set aside and not merely a part of it;

(b) the threshold to satisfy under s 37 of the AA 2005 is very low as compared I to that under s 42, though the courts are slow in setting aside an award, and upon proof, if successful, the court has an option, at either party's behest, to send back the matter to the arbitral tribunal to eliminate the grounds for setting aside, as set out in sub-s 37(6) of the AA 2005 *and*

(c) the threshold to be met under sub-para 37(1)(b)(ii) or sub-s 37(2) is on a

balance of probabilities that there has been a breach of the rules of natural justice either during the arbitral proceedings or in connection with the making of the award.

[40] The Court of Appeal also held that there is no requirement for proof of actual or real prejudice to be met where reliance is placed on sub-para 37(1)(b)(ii) read with para 37(2)(b) of the AA 2005. As for the provision in para 21(3)(b) and s 20 of the AA 2005, the court opined that although an arbitrator has the power to draw from his own knowledge and expertise, this power must be read with the arbitrator's overarching duty to act fairly and in accordance with the rules of natural justice. The said duty is a continuous duty, consistent with the universal concept of fair play that permeates and prevails throughout the whole arbitral process. The parties must be given a reasonable opportunity to present their case or arguments, including supporting or rebuttal evidence on any live issue in the arbitration irrespective of whether the issue was brought up by the parties or the arbitrator. Further, the court agreed with the ratio in *Trustees of Rotoaira Forest Trust v Attorney General* [1999] 2 NZLR 452 that, unless there is express or implied agreement to the contrary, the arbitrator is precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.

[43] The judicial approach to be applied to challenges against an award on the grounds of violation of public policy was explicated by the Federal Court in *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413. In the decision of this court in *SJIC Bina Sdn Bhd v Iskandar Regional Development Authority and another case* [2020] MLJU 2366, the legal principles that can be distilled from *Jan De Nul*'s case was summarised as follows:

(a) the concept of public policy generally is itself a broad concept and the term 'public policy' is commonly used to signify some matter which concerns public good and public interest;

(b) the term 'public policy' in sub-para 37(1)(b)(ii) of the AA 2005 covers a scope of public policy elements as used generally but in sub-para 37(2)(b)(ii), the scope is more specific since it categorises a breach of the rules of natural justice which occurred in connection with the making of an award as being in conflict with the public policy of Malaysia;

(c) in applying the concept of public policy for the purpose of setting aside an award under s 37 of the AA 2005, the concept of public policy ought to be read narrowly, more restrictively and taken in the higher sense where some fundamental principle of law or justice is engaged, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process or powers will be abused;

(d) the public policy ground for setting aside an arbitral award could be invoked where a violation of the most basic and fundamental notions or principles of morality and justice is proven. It covers fundamental principles of law and justice in both substantive and procedural aspects;

(e) instances such as 'patent injustice', 'manifestly unlawful and unconscionable', 'substantial injustice', 'serious irregularity' and other similar flaws in the arbitral process and award would fall within the applicable concept of public policy but these do not mean injustice which is more than de minimis. What is required is that the injustice had real effect and had prejudiced the basic rights of the applicant and where the upholding of the arbitral award would shock the conscience, be clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public;

(f) the circumstances stated in sub-s 37(2) of the AA 2005 are not exhaustive and other appropriate situations may also fall under the category of 'public policy' in view of the opening phrase 'without limiting the generality of sub-para (1)(b)(ii)' as appears in sub-s 37(2); and

(g) the court's intervention should be sparingly used. The court must be compelled that a strong case has been made out that the arbitral award conflicts with the public policy of Malaysia before an order can be made to set aside the award.

[44] Further guidance when dealing with an application to set aside an award premised on a breach of the rules of natural justice pursuant to para 37(2)(b) of the AA 2005 can be found in another decision by the apex court, *Master Mulia Sdn Bhd v Sigur Ros Sdn Bhd* [2020] 6 MLRA 51. In that case, the court said:

> [53] In the light of the above, we think that the guiding principles on the exercise of residual discretion when an application for setting aside an award is grounded on breach of natural justice may be stated as follows:
>
> (a) first, the court must consider: (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;
>
> (b) second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;
>
> (c) third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;
>
> (d) fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;
>
> (e) fifth, where the breach is significant and might have affected the outcome, the award may be set aside;
>
> (f) sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;
>
> (g) seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact.

[45] In the context of an application grounded on sub-para 37(1)(b)(ii) read with sub-para 37(2)(b)(ii) of the AA 2005, even though the court may find that a breach of the rules on natural justice has been established or that an arbitral award is in conflict with the public policy under s 37 AA 2005, it does not necessarily mean that the award must be set aside as a matter of course. The power of the court to set aside the award is discretionary and will not be exercised automatically in every case where the complaints are established [see para 56 in *Jan De Nul*'s case (at p 429 citing *Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] 3 NZLR 644 and *Sigur Ros*). These discretionary powers must be exercised judiciously (see para 40 in *SJIC Bina*'s case).

[32] In *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1; [2020] 6 MLRA 124, Abdul Rahman Sebli FCJ (as His Lordship then was) in delivering the judgment of the apex court said that:

[139] Like any other exercise of discretion, the discretion to set aside an award for breach of the rules of natural justice must be exercised judiciously and only when it is just to do so. The authorities are clear that in considering whether the discretion should be exercised, the court must undertake an evaluation of relevant factors such as those identified in Kyburn, amongst which would be the seriousness, magnitude or materiality of the breach, its nature and its impact, whether the breach would have any effect on the outcome of the arbitration and leaving room for 'casual breach or occasional error'. Costs of rehearing and delay in raising the complaint are further relevant factors to be taken into account in the evaluation process.

[140] Kyburn explained the position in the following terms:

> ... a finding of a breach of the rules of natural justice does not mean that the arbitral award must be set aside, that the power of the court to set aside an award is discretionary and will not be exercised automatically in every case. The discretion enables the court to evaluate the nature and impact of the particular breach in deciding whether the award should be set aside, the policy of encouraging arbitral finality will dissuade the court from exercising discretion when the breach is relatively immaterial or was not likely to have affected the outcome.

[141] The 'very low' threshold for s 37 as decided in Petronas Penapisan and Sigur Ros must be understood in the context it was made, ie that compared to s 42, the threshold under s 37 is 'very low'. In other words, it is 'very low' relative to the threshold under s 42. It must be remembered that the grounds enumerated in s 37 are exhaustive and as such the court cannot set aside an award for reasons other than those that are listed.

[142] The grounds enumerated in s 37 need to be construed narrowly as they represent exceptions to the finality of arbitration awards (s 36). This is to avoid devaluing the arbitration agreement that arbitral awards are final and binding and also to preserve the autonomy of the forum selected by the parties by minimising judicial interference in arbitral awards: *Jan De Nul*.

[143] This narrow and restrictive definition is important in terms of the public policy ground which this court in *Jan De Nul* interpreted as only encompassing

violations of the 'most basic notions of morality and justice or such violations that offend the fundamental principle of law and justice, some element of illegality, where enforcement of the award involves clear injury to public good or the integrity of the court's process and powers will thereby be abused'. What is required is that the injustice had real effect and had prejudiced the basic rights of the applicant. We do not find this to be the case in the present appeals.

[33] The aforesaid illuminating judgments by the appellate courts were applied by this court in *Kris Heavy Engineering & Construction Sdn Bhd v EP Engineering Sdn Bhd* [2019] MLJU 1928; [2019] MLRHU 1536 (affirmed by the Court of Appeal on 2 December 2020); *Sunway Creative Stones Sdn Bhd v Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd and another summons* [2020] MLJU 658; [2021] 2 MLRH 78 (appeal was discontinued), *Johawaki Development Sdn Bhd v Majlis Agama Islam Wilayah Persekutuan and another Summon* [2020] MLJU 660; [2020] MLRHU 483 (affirmed by the Court of Appeal on 17 March 2023), *SJIC Bina Sdn Bhd v Iskandar Regional Development Authority and another case* [2020] MLJU 2366 (affirmed by the Court of Appeal on 20 January 2022) and *M101 Entity Sdn Bhd v Geopancar Sdn Bhd and another case* [2022] MLJU 1354 (appeal was discontinued).

[34] Guided by the above-mentioned well-established legal principles in respect of the sub-paras under s 37 of the AA 2005 which were invoked by SPNB, each of the grounds of challenge against the award shall now be discussed.

First ground: Whether the arbitrator had decided on an issue which was not pleaded by Tunas Manja ie that the issuance of the letter of intent dated 6 Bay 2015 ('LoI') to TMDC(m) was a typo error on the part of SPNB and thereby the award should be set aside under sub-paras 37(1)(a)(v) and/or (vi) and/or sub-para 37(1)(b)(ii) read with sub-para 37(2)(b)(ii) of the AA 2005

[35] One of the issues which fell for consideration in the arbitration was whether Tunas Manja had obtained the project through fraudulent means.

[36] At the outset, it is important to bear in mind the differences between these legal entities:

(a) Tunas Manja Development & Construction Sdn Bhd ('TMDC'); Company No 323151-U with its registered address at A-4380, 1st Floor, Jalan Teluk Sisek, 25000 Kuantan Pahang and carrying out the business of housing developers and contractors);

(b) Tunas Manja Development & Construction (KL) Sdn Bhd ('Tunas Manja'); and

(c) Tunas Manja Development & Construction (M) Sdn Bhd ('TMDC(M)'). A

[37] In the statement of defence and counterclaim dated 31 March 2021, SPNB pleaded that the project was originally awarded to TMDC(M) and that at all material times, based on the supporting documents given to SPNB, it was under the impression that TMDC(M) was the same entity as TMDC. B

[38] It was further pleaded that, pursuant to TMDC(M)'s letter dated 7 August 2015, the company had informed SPNB that it was facing several issues due to the economic downturn which had severely affected its cash flow and some taxation issues. For these reasons, TMDC(M) had nominated and proposed that TMDC(M)'s obligations for the Project to be taken over by Tunas Manja. C

D

[39] SPNB went on to plead that, following the arbitration proceedings commenced by Tunas Manja, SPNB had discovered that a serious fraudulent misrepresentation had occurred which resulted in Tunas Manja being appointed as the turnkey contractor for the project.

E

[40] Tunas Manja responded in its reply and defence to counterclaim dated 19 April 2021 by explaining, among others, the events prior to the issuance of the LoI, namely that:

(a) on 4 September 2014, a working paper on the proposal was submitted by TMDC to SPNB for its consideration. This submission was subject to contract; F

(b) after several correspondence, SPNB issued a letter dated 23 January 2015 requesting TMDC's attendance in a One Stop Centre meeting on 26 January 2015 at SPNB's premises; G

(c) the meeting on 26 January 2015 was attended by the representatives of TMDC to discuss the proposal submitted by TMDC. During the meeting, TMDC's representatives informed that other investors had shown keen interest in the Project and that a special purpose vehicle ('SPV') was in the process of being incorporated to undertake the project ie TMDC(M); H

(d) after the meeting, TMDC's representative had issued a letter stating that, pursuant to the meeting and after much deliberation, the offer price for the proposal was RM108m; and I

(e) SSM had rejected the incorporation of TMDC(M) (in the email dated 12 March 2015 sent by the Admin of MyCoID, the reason given is that '... PENAMBAHAN (M), MALAYSIA ADALAH TERLALU

UMUM'). This prompted a new SPV to be incorporated leading to the incorporation of Tunas Manja on 23 March 2015.

[41] In the award, the learned arbitrator had summarised the grounds upon which SPNB had asserted that Tunas Manja had obtained the project through fraudulent means as follows (there is a typographical error in the numbering of the sub-paragraphs):

87. ...

84.1 Initially, the Respondent had intended to award the project to Tunas Manja (M) pursuant to the letter of intent dated 6th May 2015;

84.2 however, Tunas Manja (M) was a non-existent company and had fraudulently represented itself to be TMDC;

84.3 the Respondent was supplied forged documents to represent that Tunas Manja (M) is the same entity as TMDC;

84.4 the Claimant's shareholders and directors i.e., Encik Rusli bin Ismail and Puan Norhasina binti Muhammad were the directors and shareholders of Tunas Manja (M);

84.5 TMDC was stated to be a subsidiary of Tunas Manja (M) while in fact they were totally separate entities and/or non-existent; and

84.6 TMDC as the Claimant was awarded the said project because of the direct nomination of Tunas Manja (M).

[42] The learned arbitrator had also alluded to Tunas Manja's submission with regards to the testimony of Encik Fadzli Harlis @ Fadhli Hanafi bin Fauzi (RW1) in respect of the alleged forged documents which SPNB had received from Tunas Manja in the following excerpt from the award:

90.1 Encik Fadzli Harlis ... involvement was solely limited to the input of cost and not in the preparation of the whole board paper which was prepared by Encik Nizar Zamri;

90.2 There was no date received stamp on the purported documents;

90.3 Encik Fadzli Harlis ... did not personally receive the documents and was not involved in the verification;

90.4 Encik Fadzli Harlis ... was not sure who had received the documents for the Respondent;

90.5 Encik Fadzli Harlis ... was not involved in the negotiations of the terms and conditions of the DA which was under Encik Kamarul Irzuan as assisted by Puan Nor Hidayah of the Legal Department;

90.6 The decision of the Jawatankuasa Risiko dan Kewangan on 27th April 2015 was to approve the design and built proposal of Tunas Manja Development & Construction Sdn Bhd and not Tunas Manja (M); and

90.7 Encik Fadzli Harlis ... was mistaken in preparing the letter of intent in the name of Tunas Manja (M) when the approval was specifically for Tunas Manja Development & Construction Sdn Bhd.

[43] In the setting aside application — award, Mr Abdullah Az-Zubayr argued for SPNB that the award contains decisions on matters beyond the scope of submission to arbitration and that the arbitral procedure was not in accordance with the agreement of the parties because the learned arbitrator had decided that the issuance of the LoI was a typographical error whereas in the submission to arbitration, Tunas Manja did not plead that the LoI was issued by mistake.

[44] On the other hand, Tunas Manja contended that:

(a) it was only when SPNB's internal documents were tendered during the testimony of SPNB's witness that Tunas Manja was able to compare the approval of SPNB's Board in contrast to the LoI. Without any prior knowledge of SPNB's internal documents, it was not possible for Tunas Manja to state in its pleading that there was a typographical error in the LoI;

(b) the issue of a typographical error was raised during the cross-examination of RW1 and Tunas Manja, in its submission, asserted that there was a typographical error premised on SPNB's internal documents that were adduced in the arbitration proceedings;

(c) based on SPNB's paperwork on the approval of the award of the Project as quoted below, the Project was to be awarded to TMDC:

8.0 Syor

8.1 Berdasarkan Para 7.1, Lembaga Pengarah SPNB Aspirasi disyorkan menyokong perkara-perkara berikut unutk dibawa ke Jawatankuasa Risiko & Kewangan:

8 January 1 Cadangan Pembangunan Perumahan Rumah Aspirasi Rakyat melalui REKA DAN BINA dengan Tunas Manja Development & Construction Sdn. Bhd. (TMSB) di atas Lot 2425 & 2696, Batu 11, Jalan Gambang, Daerah Kuantan, Pahang.

8 January 2 Lembaga Pengarah SPNB Aspirasi memberikan kuasa kepada Pengerusi dan Ketua Pegawai Eksekutif SPNB Aspirasi untuk mengenalpasti, merunding semula dan memuktamadkan kos, mekanisme, struktur, strategi dan juga kaedah bayaran untuk menjaga kepentingan SPNB Aspirasi dan memastikan kejayaan kaedah pembangunan ini agar ianya tidak menjejaskan kepentingan SPNB Aspirasi.and

(d) in view of the approval by SPNB's Board to award the project to TMDC while the LoI was issued in the name of TMDC(M), Tunas Manja had submitted that there could be typographical error.

[45] During the hearing/clarification session in this court, SPNB's counsel highlighted para 100 of the award as reflecting the arbitrator's finding as stated in para 43 above. The said para reads:

> 100. The Claimant states that the cross-examination of Encik Fadzli Harlis @ Fadhli Hanafi bin Fauzi ('RW1') shows that the Jawatankuasa Risiko dan Kewangan had approved the design and built proposal to Tunas Manja Development & Construction Sdn Bhd. And that Encik Fadzli Harlis @ Fadhli Hanafi bin Fauzi ('RW1') had conceded his mistake for preparing the letter of intent in the name of Tunas Manja (M)2 1.

[46] In my view, a plain reading of para 100 of the award shows that the learned arbitrator was only re-stating Tunas Manja's submission. Clearly, it is not a finding by the arbitrator.

[47] The other paras in the award on the arbitrator's analysis of the issue of fraudulent misrepresentation (paras 101–116) do not disclose any finding based on a typographical error. What the arbitrator found was that:

(a) there was no contract when SPNB issued the LoI because the LoI is expressly stated to be 'WITHOUT PREJUDICE AND SUBJECT TO CONTRACT';

(b) SPNB was represented by a firm of solicitors at all material times during the negotiations of the terms and conditions of the DA after the issuance of the LoI. Hence, SPNB is estopped from denying that during the negotiations, Tunas Manja was the turnkey contractor;

(c) SPNB failed to call the officers who were involved in the preparation of the Board Papers and negotiations of the terms of the DA. As a result, the arbitrator gave a low probative value to the Board Papers; and

(d) SPNB had failed to prove that Tunas Manja's appointment was procured by unlawful means and/or based on misrepresentation.

[48] The learned arbitrator concluded in para 116 of the award that '... the Respondent's purported contention that the appointment of the Claimant was procured by unlawful means and/or based on misrepresentation is baseless, not supported by facts and the law. The Respondent has failed to discharge its burden of proving the fraudulent misrepresentation on a balance of probabilities'.

[49] A proper analysis of the award dispels any notion of an express finding or conclusion by the learned arbitrator as submitted by SPNB. It is my considered view that this ground of challenge against the award is devoid of any merit.

Second ground: Whether the award is in conflict with the public policy of malaysia under sub-para 37(1)(b)(ii) of the AA 2005 as the award involves issues of fraud before the execution of the DA and the arbitrator does not have the authority/power to decide on such issues

[50] SPNB contended that the issues of fraud were in relation to the matters prior to the entering of the DA and this would affect the validity of the appointment of the arbitrator as he would not have any authority to decide on matters before the entering of the DA. In the alternative, SPNB submitted that arbitrators do not have the power to decide on serious issues of fraud and for the purpose of public interest, such issue must be decided by the courts.

[51] Reference was made to cl 22 of the DA on 'ARBITRATION' which reads:

> All disputes differences and questions which may arise at any time hereafter between the Turnkey Contractor and SPNBASB/THE DEVELOPER regarding the true construction and interpretation of this Agreement or as to the rights and liabilities of the parties shall be referred to the decision of a single arbitrator in Malaysia to be agreed upon between the parties or failing agreement to be appointed upon the application of either party to the High Court at Malaya and such arbitrator is to be in accordance with the Malaysia Arbitration Act 1952 (Revised 1972) or any modifications or re-enactment thereto for the time being in force. The arbitration proceedings shall be held in Kuala Lumpur and shall be conducted in the English language. The decision of the arbitrator shall be final and binding on the parties.

in submitting that the arbitrator is only entitled to decide on matters which may arise with regards to the true construction and interpretation of the DA and/or rights and liabilities of the parties which may arise after the DA was entered into.

[52] Several cases were cited by the learned counsel for SPNB, notably *A Ayyasamy v A Paramasivam and Others* [2016] 7 MLJ 396, *Capital Insurance Bhd v Wierig Prefab (Selangor) Sdn Bhd* [2003] 1 MLJ 449 and *Boon Chang (M) Eng v Tejana Trading Corp Sdn Bhd & Ors* [1999] MLJU 686 in support of his submission that all the fraudulent conduct had occurred before the entering of the DA and thus would not fall within the scope and powers of the arbitrator to determine either on the grounds of public policy or the arbitrator's powers do not extend to the determination of fraud.

[53] Mention must be made of sub-para 41.9 of SPNB's written submission (p 52, encl 26) wherein it was contended that 'Despite being specifically pleaded by the Plaintiffs, had intentionally failed to call Puan Norhasina to testify whereby such acts amounts to suppression of evidence and tantamount the award to be set aside on grounds that it was induced by fraud (Celtic Bioenergy Ltd)'. However, in OS No 31 and the Scott Schedule that was prepared for purposes of the hearing, it is evident that SPNB did not invoke sub-para 37(2)(a) of the AA 2005 as one of the grounds to set aside the award. Hence, no consideration was given to this part of the written submission.

[54] Returning to SPNB's arguments and the cases as stated in para 52 above, the court finds that the correct legal position is as submitted by Tunas Manja for the following reasons:

(a) any objection or issue as to the arbitrator's jurisdiction must be raised before the arbitrator who is competent to rule on his jurisdiction. In this regard, s 18 AA 2005 provides that:

> 18 Competence of arbitral tribunal to rule on its jurisdiction
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.
>
> (2) For the purposes of subsection (1) —
>
> (a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and
>
> (b) a decision by the arbitral tribunal that the agreement is null and void shall not ipso jure entail the invalidity of the arbitration clause.
>
> (3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.
>
> (4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.
>
> (5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
>
> (6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.
>
> ...

In *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417 at p 431; [2016] CLJ 1 at p 19, the Federal Court held that:

> [39] On the issue of jurisdiction of an arbitral tribunal and the provisions of

s 18 of the 2005 Act, the learned authors of the book *The Arbitration Act 2005, UNCITRAL Model Law* as applied in Malaysia, Sundra Rajoo and WSW Davidson, commented to the following effect:

> Section 18 deals with the issue of who is to decide on the arbitral tribunal's jurisdiction and corresponds with art 16 of the Model Law. It is one of the key pillars of the Model Law. Like art 16, s 18 sets out two general principles, namely the doctrines of Kompetenz-Kompetenz and separability. The remaining parts of the section deal with the prescribed procedures for raising a plea of the arbitral tribunal's lack of jurisdiction, including the relevant time limits for raising it. The last part of the section provides however, a plea is dealt with — initially by the arbitral tribunal and later by the High Court, which has the last word on the issue of an arbitral tribunal's jurisdiction.

[40] A challenge to the jurisdiction of an arbitrator must be made during the arbitration proceedings itself, but not at the court hearing an application for a stay under s 10(1) (see s 18(5)). It is the arbitrator who decides the issue of jurisdiction. Any ruling of the arbitrator that it has jurisdiction, can be appealed to the High Court which will finally decide the matter (see s 18(8)).

In *Ketua Setiausaha Kementerian Dalam Negeri & Anor v Salconmas Sdn Bhd* [2022] 6 MLJ 836; [2022] MLRAU 152, the Court of Appeal said:

[39] The respondent submits that the failure of the appellants to state their objection to the composition of the arbitral tribunal not complying with the agreement before the arbitrator constitutes a waiver of rights to object as provided under s 7 of the Act which reads:

> 7 Waiver of right to object
>
> A party who knows:
>
> (a) of any provision of this Act from which the parties may derogate; or
>
> (b) that any requirement under the arbitration agreement has not been complied with, and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived its right to object.

[40] We disagree with the appellants' submission. *The law is trite. Any objection pertaining to the arbitrator's appointment and his jurisdiction must be raised before the arbitrator*. The High Court in Kangar second OS has held that any challenge to the arbitrator's jurisdiction must be made before the arbitrator under s 18(1) of the Act. The decision in the Kangar second OS was upheld by the Court of Appeal. (Emphasis added.)

(b) issues on fraud can be decided by the arbitral tribunal. Turning again to the judgment in *Press Metal Sarawak* the court had referred to the decisions by the English Court of Appeal in *Cunningham-Reid and*

another v Buchanan-Jardine [1988] 2 All ER 438 and *Ashville Investment Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577 as to whether an arbitrator can decide on allegations of fraud before concluding that:

> [94] The plaintiff argued that an arbitral tribunal had no power or jurisdiction to decide on a claim for declaratory orders, damages for breach of the policy and fraud, as raised in its statement of claim filed in court, and that its claim should be dealt with by the court. With respect that argument cannot not be correct. There are authorities to say otherwise ie that such ancillary reliefs can be dealt with by an arbitral tribunal.
>
> ...
>
> [101] It is clear from the above authorities that ancillary matters such as fraud, damages, an account of monies received and inquiry as to the balance of monies remaining in the defendant's hand have not been sufficient basis to deny a stay of proceedings pending arbitration. Those authorities clearly show that an arbitrator can decide those matters.

SPNB sought to distinguish the facts in *Press Metal Sarawak* with the facts in the instant case on the ground that in the former, the issue of fraud was in relation to matters which had occurred after the agreement containing the arbitration clause was entered into whereas in the latter, the alleged fraud took place prior to the execution of the DA and this would nullify the entire DA, including the arbitration clause.

SPNB's attempt to draw a distinction between the facts in the two cases is answered by the third justification in sub-para (c) below; and

(c) the arbitration clause serves as an independent agreement such that, even if the DA in this case is null and void, the arbitration clause survives. The doctrine of separability is explained in *UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 (Amended 2011 & 2018) and The AIAC Arbitration Rules 2018*, Sweet & Maxwell, 2019 by Datuk Professor Sundra Rajoo and Special Contributor Thomas R Klötzel at pp 297–301 as follows:

> 18.31 Separability means that an arbitration clause in a contract is to be considered a separate agreement, detached from the main contract, and therefore to be treated as an agreement independent of the other terms of the contract. *The validity of the arbitration clause does not depend on the validity of the contract as a whole*. The arbitration clause by surviving the demise of the main contract then constitutes the necessary agreement of the parties that any disputes between them should be referred to arbitration.
>
> 18.32 *Section 18(2)(a) and (b) uphold the separability principle*. The doctrine, therefore, seeks to preserve the arbitral process. The concept of separability of the arbitration clause is now widely accepted both by arbitration rules and in national laws due to its obvious practical advantages.

> 18.33 *The courts have affirmed the principle that the arbitration clause is autonomous from the contract which contains it and its validity does not depend on the validity of the contract as in Susu Lembu Asli Marketing Sdn Bhd v Dutch Lady Milk Industries Bhd and DG Jewelry Inc et al v Cyberdiam Canada Ltd et al.*
>
> ...
>
> 18.45 In summary, *the arbitration agreement is accepted as separate from the underlying agreement, a concept defined as the separability principle. This principle prevents the validity of one agreement from being affected by the other one even in the case of the latter being void, voidable or invalid.*
>
> 18.46 *This principle effectively establishes the full autonomy of an arbitration agreement and the integrity of the arbitral process*. The case laws above from different jurisdictions show that courts have uniformly employed the principle in favour of arbitration, upholding the intent of the parties to arbitrate. (Emphasis added.)

[55] In view of the above said considerations, this court was inclined to find and hold that the second ground on which SPNB had sought to set aside the award is similarly unmeritorious.

Whether the award is in conflict with the public policy of Malaysia under sub-para 37(1)(b)(ii) read with sub-para 37(2)(b)(i) of the AA 2005 because at the initial stage of the arbitration, Mr Mohd Aiman bin Abdul Aziz was appointed as counsel for SPNB when he was, at the same time, practising under the name of Tunas Manja's firm of solicitors at the branch in Port Dickson, Negeri Sembilan

[56] SPNB alleged that there was a breach of the rules of natural justice because, at the initial stage of the arbitration, the parties were represented by an advocate and solicitor who was practicing in the same firm.

[57] The chronology of events which led to the submission of the third ground in the setting aside application — award is set out below:

(a) SPNB was initially represented by Messrs Nazri Yahya & Co ('Messrs NYC') through its partner Wan Syahir Azmir bin Wan Mohd Razi;

(b) NYC had appointed Mr Mohd Aiman bin Abdul Aziz ('Aiman') as counsel in order to conduct the matter;

(c) Tunas Manja's solicitors has always been Messrs ADR with an address at C3–2–10, Solaris Dutamas, Jalan Dutamas 1, 50480 Kuala Lumpur;

(d) at all material times, Aiman was practicing under the name and style of Messrs. ADR at its branch located at No 10–2, Block 3, PD Waterfront, 71000 Port Dickson, Negeri Sembilan. Aiman had assisted SPNB in

drafting the defence, conducting meetings at SPNB's premises and vetting SPNB's documents. Aiman had access to privileged information;

(e) upon discovering that Aiman is practicing in Messrs ADR's branch office in Port Dickson, SPNB had terminated the services of Messrs NYC and Messrs Zulpadli & Edham ('Messrs ZE') was accordingly appointed; and

(f) Messrs ZE had, on 1 December 2020, requested for the arbitration to be heard before a new quorum ('said request'), however the application was refused by the arbitrator on 25 January 2021.

[58] SPNB cited the case authorities of *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; [1998] 3 CLJ 85, *Lee Kam Sun v Ho Sau Lin & Anor* [1999] 4 MLJ 509; [1999] 4 CLJ 507, *Ng Siew Lan v John Lee Tsun Vui & Anor* [2017] 2 MLJ 167; [2017] 2 CLJ 245 and *Darshan Singh Khaira v Majlis Peguam Malaysia* [2021] 5 MLJ 921; [2021] 10 CLJ 497 to support its submission that, whatever position held by Aiman in Messrs ADR, the proximity of a partner or legal assistant practicing in the same firm, albeit in different branches, is too close and Aiman's conduct showed that he had provided legal service to SPNB whilst practising in the same firm as the solicitors for Tunas Manja. This amounts to a conflict of interest and the arbitrator should have allowed the said request.

[59] SPNB further submitted that, in any event, the arbitrator should not have proceeded with the proceedings in the face of such serious allegations. The arbitrator should have acceded to the request for the proceedings to be heard before a newly constituted arbitral tribunal. Instead, by proceeding with the hearing and in making the award, the fundamental principles on the rules of natural justice were breached.

[60] I am of the view that SPNB's allegation of the occurrence of a breach of the rules of natural justice within the meaning of sub-para 37(2)(b)(i) of the AA 2005 (see item 5 in the Scott Schedule) was not established for the following reasons:

(a) SPNB's grievance was ventilated and decided on 15 June 2021 in OS No WA-24C(ARB)-11–02 of 2021 ('OS No 11') and SPNB did not appeal against the decision of this court in dismissing the application with no order as to costs. The counsels who appeared for the parties in OS No 11 are the same counsels in the present applications, namely, Mr Abdullah Az-Zubayr and Mr FF Pook.

In OS No 11 which was instituted by SPNB against Tunas Manja on 24 February 2021, SPNB sought, among others, for the following reliefs:

(i) that the arbitration proceedings before the learned arbitrator be stayed pending disposal of OS No 11;

(ii) that the arbitration proceedings be transferred and be determined by the Asian International Arbitration Centre ('AIAC'); and

(iii) that a new arbitrator be appointed by the court.

In the intitulement of the OS, SPNB had cited ss 10 and 13 of the AA 2005, r 4 and 5 of the Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration ('KLRCA Rules'); and O 69 rr 2, 4, 7 and 10 of the ROC 2012.

In the body of the OS, SPNB's application is said to be made pursuant to the inherent and/or implied jurisdiction of the court (in so far as the power of the court is concerned, it is trite that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers and as O 69 RC 2012 is the specific rule that was inserted for arbitration proceedings, SPNB's application must be brought within the confines of that provision: see *Permodalan MBF Sdn Bhd v Tan Sri Dato' Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 and *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307. In addition, s 8 of the AA 2005 explicitly limits court intervention to matters which are specifically provided in the AA 2005. The inherent or common law powers cannot be invoked in any matter governed by the AA 2005).

For the convenience of reference, the provisions as stated in the intitulement of the OS are quoted below:

(i) ss 10 and 13 AA 2005:

> 10 Arbitration agreement and substantive claim before court
>
> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
>
> (2A) Where admiralty proceedings are stayed pursuant to subsection (1), the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest —
>
> (a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute; or
>
> (b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.

(2B) Subject to any rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order under subsection (2A) as would apply if it were held for the purposes of proceedings in the court making the order.

(2C) For the purpose of this section, admiralty proceedings refer to admiralty proceedings under Order 70 of the Rules of the High Court 1980 [PU(A) 50/1980] and proceedings commenced pursuant to paragraph 24(b) of the Courts of Judicature Act 1964 [Act 91].

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

(4) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

13 Appointment of arbitrators

(1) Unless otherwise agreed by the parties, no person shall be precluded by reason of nationality from acting as an arbitrator.

(2) The parties are free to agree on a procedure for appointing the arbitrator or the presiding arbitrator.

(3) Where the parties fail to agree on the procedure referred to in subsection (2), and the arbitration consists of three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator as the presiding arbitrator.

(4) Where subsection (3) applies and —

(a) a party fails to appoint an arbitrator within thirty days of receipt of a request in writing to do so from the other party; or

(b) the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment or such extended period as the parties may agree, either party may apply to the Director of the Asian International Arbitration Centre (Malaysia) for such appointment.

(5) Where in an arbitration with a single arbitrator—

(a) the parties fail to agree on the procedure referred to in subsection (2); and

(b) the parties fail to agree on the arbitrator, either party may apply to the Director of the Asian International Arbitration Centre (Malaysia) for the appointment of an arbitrator.

(6) Where, the parties have agreed on the procedure for appointment of the arbitrator —

(a) a party fails to act as required under such procedure;

(b) the parties, or two arbitrators, are unable to reach an agreement under such procedure; or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the Director of the Asian International Arbitration Centre (Malaysia) to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) Where the Director of the Asian International Arbitration Centre (Malaysia) is unable to act or fails to act under subsections (4), (5) and (6) within thirty days from the request, any party may apply to the High Court for such appointment.

(8) In appointing an arbitrator the Director of the Asian International Arbitration Centre (Malaysia) or the High Court, as the case may be, shall have due regard to —

(a) any qualifications required of the arbitrator by the agreement of the parties;

(b) other considerations that are likely to secure the appointment of an independent and impartial arbitrator; and

(c) in the case of an international arbitration, the advisability of appointing an arbitrator of a nationality other than those of the parties.

(9) No appeal shall lie against any decision of the Director of the Asian International Arbitration Centre (Malaysia) or the High Court under this section.

(ii) rr 4 and 5 of the KLRCA Rules:

Rule 4 Appointment

(1) Where the parties have agreed to the KLRCA Rules, the Director shall be the appointing authority.

(2) Parties are free to determine the number of arbitrators.

(3) If the parties fail to determine the number of arbitrators and the Director does not determine the number having regard to the circumstances of the case, the arbitral tribunal shall:

(a) in the case of an international arbitration, consist of three arbitrators; and

(b) in the case of a domestic arbitration, consist of a sole arbitrator.

(4) If the parties have agreed that a sole arbitrator is to be appointed, unless the parties have agreed otherwise, the procedure for the appointment shall be:

(a) the parties are free to agree on the sole arbitrator; or

(b) if within 30 days of the other party's receipt of the notice of arbitration, the parties have not reached an agreement on the appointment of the sole arbitrator, any party may request for the sole arbitrator to be appointed by the Director.

(5) If the parties have agreed that three arbitrators are to be appointed, unless the parties have agreed otherwise, the procedure for the appointment shall be:

(a) each party shall appoint one arbitrator, and the two appointed arbitrators shall choose the third arbitrator, who will act as the presiding arbitrator of the arbitral tribunal;

(b) *if within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the Director to appoint the second arbitrator; and*

(c) if within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the Director.

(6) If the KLRCA upon the request of a party is to appoint a sole arbitrator, a member of the arbitral tribunal or emergency arbitrator, the Director shall appoint the arbitrator in accordance with the KLRCA Rules. In doing so, the Director at the Director's discretion may seek such information from the parties as the Director deems appropriate and exercise other powers as vested in the Director by the KLRCA Rules.

(7) Where the parties have agreed that any arbitrator is to be appointed by one or more parties, or by any authority agreed by the parties, including where the arbitrators have already been appointed, that agreement shall be treated as an agreement to nominate an arbitrator under the KLRCA Rules and shall be subject to confirmation by the Director at the Director's discretion.

Rule 5

Challenge to the arbitrators

(1) An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess any requisite qualification on which the parties agreed.

(2) A party may challenge the arbitrator nominated by that party only for reasons which the party becomes aware of after the appointment has been made.

(3) A challenge to an arbitrator shall be made by sending a notice of challenge within 15 days after having received the notice of appointment of the challenged arbitrator or within 15 days after the circumstances mentioned in Rule 5(1) or Rule 5(2) became known to that party.

(4) The notice of challenge shall be sent simultaneously to the other Parties, to the arbitrator who is challenged, to the other members of the arbitral tribunal, if any, and copied to the Director. The notice shall be in writing and shall state the grounds for the challenge. The notice of challenge shall be accompanied by a non-refundable fee amounting to USD5,300.00 in international arbitration and RM10,600.00 in domestic arbitration.

(5) The Director may order suspension of the arbitration until the challenge is resolved.

(6) If an arbitrator is challenged by one party, the other party may agree to the challenge. The challenged arbitrator may also withdraw from office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

(7) If within 15 days after having received the notice of challenge, the other party does not agree to the challenge and the arbitrator who is being challenged does not withdraw voluntarily, the Director shall decide on the challenge in writing and state reasons for the decision.

(8) If required pursuant to Rule 5(6) or Rule 5(7), the substitute arbitrator shall be appointed in accordance with the procedure provided in Rule 4.

(iii) O 69, rr 2, 4, 7 and 10 of the ROC 2012:

2 Claims under the 2005 Act (O 69 r 2)

(1) In this Order, 'arbitration claim' means any application to the Court under the 2005 Act, including a claim to —

(a) appoint an arbitrator under subsection 13(7) of the 2005 *Act;*

(b) decide on the challenge of an arbitrator under subsection 15(3) of the 2005 Act;

(c) decide on the termination of the mandate of an arbitrator under subsection 16(2) of the 2005 Act;

(d) appeal against the ruling of the arbitral tribunal on jurisdiction under subsection 18(8) of the 2005 Act;

(e) enforce interlocutory orders or directions of an arbitral tribunal made under section 19 of the 2005 Act;

(f) seek interlocutory orders or directions under section 11 of the 2005 Act;

(g) determine under section 41 of the 2005 Act, any question of law arising in the course of the arbitration proceedings;

(h) determine under section 42 of the 2005 Act, any question of law arising out of an award;

(i) set aside an award under section 37 of the 2005 Act;

(j) direct any matter in connection with bankruptcy proceedings under section 49 of the 2005 Act;

(k) enforce an award under section 38 of the 2005 Act;

(l) extend time under section 45 or 46 of the 2005 Act; and

(m) seek an order under subsection 44(4) of the 2005 Act where the arbitral tribunal withholds its award for non-payment of fees and expenses.

(2) An application under sub-paragraph (1)(b) or (d) shall be made within thirty days from the receipt of a notice by the applicant of the decision or ruling of the arbitral tribunal.

(3) An application under sub-paragraph (1)(b), (c), (g), (h), (i) or (m) shall be served on each arbitrator.

4 Starting the claim (O 69 r 4)

(1) An arbitration claim under rule 2 or rule 3 may be made using the originating summons procedure, and Form 5 shall be filed in the High Court. An arbitration claim originating summons shall —

(a) include a concise statement of —

(i) the remedy claimed; and

(ii) any question on which the applicant seeks the decision of the Court;

(b) state the grounds in support of the originating summons;

(c) show that any statutory requirements have been met;

(d) specify the section of the 1952 Act or the 2005 Act under which the claim is made;

(e) specify the respondents on whom the arbitration claim originating summons is to be served, stating their role in the arbitration; and

(f) identify against which, if any, respondents an order of costs is sought.

(2) The applicant shall file by affidavit, written evidence on which he intends to rely when he files his originating summons, including a copy of the arbitration agreement and the award, where relevant.

(3) Unless the Court orders otherwise, an arbitration claim originating summons and the affidavit shall be served on the respondents specified in sub-paragraph (1)(e), within thirty days from the date of issue.

(4) Where relevant, rules 5 to 8 shall additionally apply.

7 Preliminary question of law (O 69 r 7)

(1) An application under section 41 of the 2005 Act to determine any question of law arising in the course of the arbitral proceedings shall, in addition to the matters stated in rule 4(1) —

(a) be made either with —

(i) the agreement in writing of all the parties to the arbitral proceedings; or

(ii) the permission in writing of the arbitral tribunal; and

(b) identify the question of law to be determined.

(2) The applicant shall file by affidavit, written evidence on which he intends to rely when he files his originating summons, including a copy of the

arbitration agreement and the written agreement or permission under sub-paragraph (1)(a).

(3) The originating summons and affidavit shall be served on each arbitrator and the respondents.

10 Stay of legal proceedings (O 69 r 10)

(1) An application seeking a stay of legal proceedings under section 10 of the 2005 Act shall be served on all parties to those proceedings who have given an address for service.

(2) A copy of an application under paragraph (1) shall be served on any other party to the legal proceedings (whether or not he is within the jurisdiction) who has not given an address for service, at —

(a) his last known address; or

(b) a place where it is likely to come to his attention.

(3) Where a question arises as to whether —

(a) an arbitration agreement has been concluded; or

(b) the dispute which is the subject matter of the proceeding falls within the terms of such agreement, the Court may decide that question or give directions to enable it to be decided and may order the proceeding to be stayed pending its decision.

The averments in the AIS for the setting aside application — award on the purported conflict of interest (paras 32–42) are similar to the affirmations in the AIS for OS No 11 (paras 9–14, encl 2).

In OS No 11, Tunas Manja raised a preliminary objection that the intitulement in the OS is not reflective of the pleading and this is fatal to SPNB's application, which ought to be dismissed in limine. This court allowed the preliminary objection due to the following reasons:

(i) in so far as the citation to s 10 of the AA 2005 is concerned, there was no proceeding which was pending in court as at 24 February 2021. The arbitration proceedings had commenced, and the parties had submitted their respective pleadings when SPNB filed OS No 11. Hence, there was no court proceeding to be stayed;

(ii) with regards to s 13 of the AA 2005, the parties had mutually agreed to appoint Datuk Sundra Rajoo as the sole arbitrator to determine the dispute between them. In the letter dated 7 August 2020 to Messrs ADR which was signed by SPNB's Head of Legal & Litigation (exh 'WP2', encl 2, OS No 27), SPNB said that it had perused the contents of Messrs ADR's letter dated 23 June 2020 and the profile of the respective arbitrators and 'Based on the credential, on behalf of SASB, we hereby agree to select Datuk Professor Sundra Rajoo from Sundra Rajoo Arbitration Chambers Sdn Bhd to be appointed as the sole arbitrator ...

. The appointment was confirmed in the Terms of Engagement of the Tribunal which were issued on 16 August 2020. Subsequently, the Tribunal's Order No 1 for the timetable of the arbitration proceedings, by consent of the parties following the Preliminary Meeting No 1, was issued. Several correspondences between the parties and the arbitrator ensued which finally led to the arbitrator's ruling on 25 January 2021 ('arbitrator's ruling') that:

> My appointment as Sole arbitrator for the above matter was mutually agreed between parties.
>
> This fact is confirmed by my letter to parties dated 16th August 2020 enclosing my Terms of Engagement dated 16th August 2020 to the parties and also, during the preliminary meeting on 26th August 2020 as recorded at para 2 of the Order No 1 dated 26th August 2020 as follows:
>
> The parties confirm my appointment as the Sole arbitrator together with the Terms of Appointment issued on 16th August 2020.
>
> There exist no cogent reason for me not to proceed with the arbitration.
>
> I confirm that there is no conflict of interest for me to act as Sole arbitrator for the above matter and I am independent of the parties.
>
> I further note that the Claimant has agreed for the arbitration proceeding to recommence de novo.

A meeting was then held on 28 January 2021 and the Tribunal's Order No 2 was issued on 28 January 2021. The parties had taken steps to start the arbitration proceeding *de novo* with, inter alia, Tunas Manja delivering a fresh statement of claim on 10 February 2021 and SPNB submitting its statement of defence and counterclaim on 31 March 2021, after being granted an extension of time of three weeks to do so. Therefore, SPNB's reliance on s 13 of the AA 2005 for the reliefs sought in OS No 11 is misconceived;

(iii) rr 4 and 5 of the KLRCA Rules are inapplicable as cl 22 of the DA does not state that the parties have agreed for the KLRCA Rules to apply to the arbitration. Similarly, there is no statement to that effect in the terms of engagement of the Tribunal and any of the Tribunal's orders. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings and where the parties fail to agree, the arbitral tribunal may, subject to the provisions of the AA 2005, conduct the arbitration in such manner as it considers appropriate (see sub-ss 21(1) and (2) of the AA 2005);

(iv) O 69 rr 7 and 10 of the RC 2012 are clearly not applicable as SPNB's application in OS No 11 was not made pursuant to s 41 of the AA 2005 to determine any question of law arising in the course of the arbitral proceedings and as explained above, the reference to s 10 of the AA 2005

is incorrect. In any event, the provisions in sub-rr 7(1)(a)(i) or (ii) of O 69 of the ROC 2012 have not been complied with; A

(v) as for O 69 r 2(1) of the ROC 2012, 'arbitration claim' means any application to the court under AA 2005 and includes a claim to decide on the challenge of an arbitrator under sub-s 16(3) of the AA 2005 (see sub-r (b)). The court agrees with Tunas Manja's submission that the true effect of OS No.11 is to remove the learned arbitrator to enable the appointment of a new arbitrator. In this regard, s 14 of the AA 2005 governs the matter on the grounds for challenge as to an arbitrator's appointment and any party who intends to challenge an arbitrator must comply with the challenge procedure as set out in s 15 of the AA 2005. These provisions are not mentioned at all in the intitulement of OS No 11; B C

(vi) O 69 r 4 of the ROC 2012 sets out the matters which must be included in the OS and subrule (d) provides that the section of the AA 2005 under which the claim is made must be specified. As discussed earlier, SPNB has failed to show the relevance of ss 10 and 13 of the AA 2005 to the application in OS No 11. D

On the date of hearing of SPNB's application on 28 May 2021, the court had questioned SPNB's counsel on the applicability of ss 10, 13, 15 and 41 of the AA 2005 and rr 4 and 5 of the KLRCA Rules. It was immediately apparent that the learned counsel did not read the provisions properly and nor did he study the case authorities which have discussed the same. E

Although the learned counsel argued that Tunas Manja was not prejudiced in any way as Tunas Manja was aware of the case against it as demonstrated from the affidavits and written submissions filed for OS No 11, the court was of the view that this was not a case where technical objections on intitulements were simply thrown in, but rather, there was a critical failure to state the correct statutory provisions in the intitulement. In the absence of any express statutory provision in the body of the OS, SPNB's failure was fatal, and the suit must be dismissed in limine (see *Abad Arena Juara Sdn Bhd v Rajesh Jaikishan* [2019] MLRAU 307). F G

Assuming that this court has erred in the findings on Tunas Manja's preliminary objection, the court has nevertheless considered the merits of the application with the result being no different ie SPNB's application would still be dismissed. This is because: H

(i) SPNB's contention that the arbitration proceeding was not registered with AIAC and the arbitration proceeding has ceased is flawed. The arbitration agreement in cl 22 of the DA merely provides that all disputes shall be referred to a single arbitrator in Malaysia and as the parties had mutually agreed on the appointment of Datuk Sundra Rajoo, there was no necessity for any party to make an application to the I

A High Court in Malaya. No reference whatsoever is made in cl 22 of the DA to the KLRCA/AIAC and its Rules. Clearly, the arbitration is to be in accordance with the AA 2005, following the repeal of the Arbitration Act 1952 (Act 93) with effect from 15 March 2006, and the arbitration proceedings are to be held in Kuala Lumpur and conducted in the B English language.

The arbitration proceeding is also clearly still afoot in the light of the arbitrator's ruling on 25 January 2021 as quoted previously;

(ii) Tunas Manja had exhibited a WhatsApp conversation on 25 August C 2020 between Aiman and SPNB's representative (exh 'MA1', encl 4 in OS 11) which shows that SPNB had agreed to the appointment of Datuk Sundra Rajoo as the arbitrator before Messrs. NYC was officially appointed to represent SPNB. Furthermore, in the AIR affirmed by Aiman on 24 March 2021 (encl 4), he averred that '... saya tidak pernah D menasihatkan Plaintif dalam perkara pelantikan Penimbang tara' and '... Penimbang Tara telah pun dilantik oleh Plaintif sebelum TNYC diminta untuk mengambil tindakan prosiding arbitrasi ini'. This evidence supports Tunas Manja's argument that the arbitrator was appointed for the reason of his credentials and not on any purported E advice by Aiman to SPNB;

(iii) in its written submission dated 11 May 2021 (encl. 10 in OS No 11), SPNB submitted that there are three questions of law to be determined pursuant to s 41 AA 2005. The questions are reproduced below:

F (i) Whether based on the facts stated a serious conflict of interest had occurred?

(ii) Whether a new arbitrator must be appointed pursuant to s 15 of the Arbitration Act 2005 as result of the said conflict of interest as the arbitrator would have a prior inference and/or understanding of the Claimant's Claim G and the Respondent's Defence based on the pleadings which was previously prepared and submitted?

(iii) Whether the arbitration proceedings must be decided and transferred to AIAC as a result of the conflict of interest which had occurred as the arbitrator would have a prior inference and/or understanding of the Claimant's Claim H and the Respondent's Defense based on the pleadings which was prepared by the?

However, SPNB did not cite s 41 AA 2005 in OS No 11; the questions are essentially questions of facts, and not of law; and the mandatory I requirements of O 69 r 7 of the RC 2012 have not been fulfilled (see the cases as submitted by Tunas Manja ie *Sebiro Holdings Sdn Bhd v Bhag Singh & Anor* [2014] 11 MLJ 761; [2015] 4 CLJ 209, *Bauer (M) Sdn Bhd vKukdong Engineering & Construction Co Ltd* [2017] 7 CLJ 414 and *Abad Arena Juara*);

(iv) apart from the fact that there is insufficient appreciation on the part of SPNB and its counsels of the provisions of the AA 2015 as to the recourse which is available to a party who has justifiable doubts as to the arbitrator's impartiality or independence (see ss 14 and 15 of the AA 2005), the affidavit evidence adduced by SPNB leans towards the alleged conflict of interest between the solicitors of the parties, rather than on circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence, to support the application to remove the arbitrator; and

(v) the arbitration proceeding has recommenced de novo and SPNB has accepted and participated in the recommenced proceeding.

The decision of the court in dismissing SPNB's application should not be seen as condoning Aiman's conduct in the whole affair. During the hearing of OS No 11 on 28 May 2021, the court had expressed its displeasure at the fact that Aiman had agreed to assist Messrs. NYC in the arbitration matter when Aiman was fully aware that Messrs ADR is representing Tunas Manja. The court had advised the parties to explore an amicable solution to the problem at hand. However, on 15 June 2021, the learned counsels reported that no amicable settlement was reached and hence, the court was constrained to dismiss SPNB's application for the reasons as outlined above;

(b) SPNB's complaint does not fall within the ambit of the provisions of the AA 2005 which was relied upon. The arbitration proceedings were re-commenced de novo when SPNB appointed Messrs ZE and SPNB had fully ventilated its case before the arbitral tribunal.

[61] In the upshot, the third ground of challenge against the award has not been established.

Fourth ground: Whether the award is in conflict with the public policy of malaysia under sub-para 37(1)(b)(ii) read with sub-para 37(2)(b)(ii) of the AA 2005 as there was total failure by the arbitrator to analyse and appraise the relevant evidence presented by SPNB

[62] In the light of SPNB's decision not to pursue certain grounds of its challenge against the award as mentioned in para 26 above, SPNB's pursuit of the public policy and denial of natural justice arguments are confined to the averments in sub-para 53.9 of the AIS, namely, that the arbitrator had '... failed to take into consideration and/or weigh the facts and/or evidence and evidence thoroughly and/or carefully, when the particulars are as follows:

53.9.1 That the arbitrator had totally failed to directly take into account the testimony of the first Plaintiff's witness, Mr. Fadzli, that he had checked all the

documents related to the first work and confirmed that the forged documents had been in the possession of the Plaintiff before being presented and approved on 27 January 2015;

53.9.2 That the arbitrator had totally failed to take into account that Mr Fadzli is the party that has submitted the letter of intent dated 6 May 2015 based on the approval that has been obtained in relation to the paperwork and is also the party that was present at the meeting dated 26 January 2015 with TMDC (M);

53.9.3 That the arbitrator had totally failed to directly consider the content of the paper by referring merely to the title of the paper;

53.9.4 That in addition to only referring to the title of the paper and the working paper, the arbitrator has totally failed to take into account that there are other documents and examine the contents, which have been submitted by the Plaintiff to support and prove fraud such as the TMDC letter (M) dated 26 January 2015 signed by Ahmad Kamal Bahrin Bin Othman and the list of parties present at the meeting on 26 January 2015;

53.9.5 That the arbitrator had totally failed to take into consideration the plaintiffs documents, all the paper works and/or the original offer letter which was relied upon by the Plaintiff in order to issue the letter of intent dated 6 May 2015 was based on the contents of the letter issued by TMDC(M) had 26 January 2015;

53.9.6 That the arbitrator has totally failed take into account the letter of intent dated 6 May 2015 was accepted by En Ahmad Kamal Bahrin Bin Othman despite the fact that the Defendants involvement was after TMDC (M) had issued their letter dated 7 August 2015 and the Plaintiffs had requested the documents from the Defendants via their letter dated 2 September 2015 requesting the documents. The Defendants own witness had also provided conflicting testimony stating that En Ahmad Kamarul Bahrin Bin Othman held no position and/or was not involved with the Defendants;

53.9.7 That the arbitrator had totally failed to directly take into account the content of TMDC (M)'s letters dated 7 August 2015 which clearly represented that the Defendant was a subsidiary of TMDC (M);

53.9.8 That the arbitrator had totally failed to directly take into account that the Defendant's own witness had said that he did not know about the initial stage and how the project was obtained as well as the Defendant's own witness's admission that all the parties present at the initial stage were Mrs. Nor Hasina;

53.9.9 That the arbitrator has totally failed to take into account the testimony and admission of the Defendant's own version that TMDC(M) is a company that wants to be incorporated but cannot due to the nearly identical name and not a typo as decided by the arbitrator;

53.9.10 That the arbitrator has totally failed to take into account the evidence and/or chronology of the facts presented in relation to the fraud issue, namely the involvement of the parties at the initial stage, the documents that the Defendant himself acknowledged and how the Defendant's involvement obtained the project precisely and thoroughly;

53.9.11 That the arbitrator had totally failed to take into account that the Defendant himself in the Defendant's Bundle of Documents has stated that the

letter dated 26 January 2015 issued by TMDC(M) has stated that the letter is the Defendant's own letter and that the Plaintiff's letter of intent dated 6 May 2015 was received by the Defendant himself whereas the Defendant's involvement was only on 2 September 2015;

53.9.12 That the arbitrator had totally failed to take into account that the Defendant did not respond to the Plaintiff's letter dated 20.06.2016 to the Defendant telling the Defendant to make amendments to the housing project development plan, so at all material times there was no agreed development plan between the Plaintiff and the Defendant and the construction of the project is hindered by the Defendant's own failure and refusal to amend the development plan;

53.9.13 That the arbitrator had totally failed to consider that the Defendant's director did not know how the Defendant received the project from the early stage since he testified that all information about the project from the initial stage was obtained from Puan Norhasina, the Defendant's former director.

[63] A perusal of the aforesaid affirmations leaves no doubt that SPNB did not take the position that the arbitrator had denied SPNB the opportunity to present or ventilate its case fully. Rather, SPNB challenged the findings by the arbitrator which involved mixed findings of fact and law and is in the nature of an appeal.

[64] In *SJIC Bina*, this court said that:

[58] The foregoing quoted parts from the award lays to rest any arguments that the Tribunal did not take into account IRDA's submission on the competing commercial interests of the parties in interpreting the words 'any savings to the Contract'. The learned arbitrator was undoubtedly sensitive to the fact that the Contract is a commercial contract and that IRDA and SJIC Bina had their own perspectives on how the said words and Letter Exchange on the Design Change should be construed. The critical consideration is that the Tribunal must have accorded procedural fairness to the parties by giving them the opportunity to be heard and latitude in presenting their case before the pronouncement of the award. Ultimately, the Tribunal must choose between the two diametrically opposed positions taken by the parties. Having made that choice, IRDA is evidently dissatisfied and has attempted to attack what is essentially the merits of the award in the guise of a purported breach of the rules of natural justice.

...

[91] In the final analysis, IRDA is unhappy that the Tribunal did not decide in its favour and thus attempts to re-open the findings of facts made by the Tribunal. As IRDA itself is fully aware, it is trite that the court does not sit as an appellate body to review the correctness of the award on its merits. The Tribunal is the sole determiner as to the evaluation of the evidence and on findings of fact: see *Top Speed Holding Sdn Bhd v Conlay Constuction Sdn Bhd* [2011] MLJU 121, *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 6 MLJ 126 and *Garden Bay*. In this case, the learned arbitrator had steered a middle course through all the arguments in arriving at his own findings and conclusions for which adequate

reasons were given (see *Ahmani Sdn Bhd v Petronas Penapisan (Melaka) Sdn Bhd* [2015] 11 MLJ 32).

[65] Therefore, this forth ground is nothing more than an attempt to attack the merits of the award under the guise of a purported breach of the rules of natural justice. It is trite that the courts do not, in an application under s 37 of the AA 2005, review the merits of the award.

Fifth ground: whether the award is in conflict with the public policy of Malaysia under sub-para 37(1)(b)(ii) read with sub-para 37(2)(b)(ii) of the AA 2005 as it constitutes unjust enrichment by allowing for double recovery

[66] SPNB relied on the decision of this court in *Johawaki Development* in raising its grievance against the award where the arbitrator allowed Tunas Manja's claims in the sum of RM25,231,284.11 for loss of profit of the balance of work from the project and RM935,951.92 in respect of IPC No 1 for the work done. SPNB asserted that the latter is wasted expenditure ie costs incurred by Tunas Manja and the award amounts to double recovery.

[67] In my opinion, this ground is premised on a misconception of the decision of this court in *Johawaki Development*. In that case, the arbitrator allowed the recovery of actual loss and loss of profit whereas here, the parties have agreed to cl 3.1 of the SDA which reads as follows:

> 3.1 Without prejudice to any other rights or remedies which the Turnkey Contractor may possess, the parties hereby agree that in the event that the Developer fails or refuse to:-
>
> (a) pay the Development Cost or any part thereof in accordance to the development agreement and/or this Supplementary development agreement;
>
> (b) execute, materialize or carry out the Project in accordance to the development agreement and/or this Supplementary development agreement; or
>
> (c) comply with any of its agreements, undertakings, covenants, warranties and/or obligations under the provision of the development agreement and/or this Supplementary development agreement,
>
> the Turnkey Contractor shall give to the Developer a fourteen (14) days notice to rectify the breach or default of the Developer, and in the absence or default of such rectification action or measure, the Turnkey Contractor shall be entitled at its own discretion to suspend the execution of the Project until such time payment is made *OR to terminate the development agreement and/or this Supplementary development agreement and claim from the Developer liquidated ascertained damages equivalent to the entire loss of profits by the Turnkey Contractor on the Development Cost and the cost and expenses of all works done and value of materials at site as ascertained by an independent Quantity Surveyor*, and the legal fees and all other losses, damages, costs

and expenses incurred and/or may be incurred by the Turnkey Contractor for the enforcement of the development agreement and/or this Supplementary development agreement. (Emphasis added.)

[68] It is clear from cl 3.1 of the SDA that in the event of termination of the DA/SDA by Tunas Manja, it may claim for liquidated ascertained damages equivalent to the entire loss of profits on the development costs and the cost and expenses of all works done and value of materials at site.

[69] By allowing Tunas Manja's claim for RM935,951.92 for works done as per IPC No 1 and for RM25,231,284.11 as loss of profit of the balance of work from the project, the arbitrator awarded what was bargained for by the parties in the event of default by SPNB. The parties must be held to the contract that they made and it is not open to SPNB to renege on the clear and express terms of the contract.

[70] SPNB's contention that there is unjust enrichment is simply unsubstantiated.

Sixth ground: Whether the award is in conflict with the public policy of malaysia under sub-para 37(1)(b)(ii) read with sub-para 37(2)(b)(ii) of the AA 2005 when the arbitrator, in awarding cost, had relied on external evidence adduced at the stage of submissions after the parties had closed their case

[71] SPNB's final complaint against the award is as to the arbitrator's decision to award costs in the arbitration in the sum of RM713,958.52, the breakdown of which is as shown below:

No	Item	Sum (RM)
1	Arbitration Fees	327,771.40
2	Legal Fees	314,926.53
3	Expert Fees	60,000
4	Ancillary/Miscellaneous Fees	11,260.59
5	Total Cost Claimed	713, 958.52

[72] According to SPNB, the documents in relation to costs were only adduced at the submission stage rather than at the hearing stage, and this prevented SPNB from adducing any new evidence to refute the same or to cross-examine Tunas Manja's witnesses on the veracity of the documents. The arbitrator was accused of failing to treat the parties equally and hence, a breach of the rules of natural justice occurred.

[73] It is the considered view of the court that SPNB's contention is erroneous because:

(a) in conformity with the provision in s 21 of the AA 2005, the arbitrator had issued Procedural Order No 5 on 1 October 2021 directing, among others, that 'The Parties' Post-Hearing Submissions and Reply Submissions shall include submissions on costs;'. Tunas Manja did include submissions on costs but SPNB did not. And nor did SPNB dispute the costs as submitted by Tunas Manja (see paras 265 and 266 in the award). This ground of attack against the award, is as described by Tunas Manja's counsel — 'crying over spilled milk' or to use another expression, SPNB is the author of its own misfortune;

(b) the parties were given equal opportunities to submit on the issue of costs. By failing or refusing to make submissions on costs and to challenge the costs as sought by Tunas Manja, SPNB acted to its own peril. It does not lie in the mouth of SPNB to now claim that a breach of the rules of natural justice occurred in connection with the making of the award; and

(c) the arbitrator had addressed the matter on costs in the award by referring to Tunas Manja's submission as SPNB chose not to make any submission (see paras 253–261 of the award) and in his analysis, the arbitrator said:

> 262. The Tribunal's powers to award costs derive from the terms of the arbitration agreement and/or the law of the place of arbitration (i.e. the lex arbitri).
>
> 263. Sections 33(6) and 44 of the Arbitration Act 2005 empower the Tribunal to award cost and interest. This is a discretionary power which is to be exercised in a judicial manner.
>
> 264. The applicable principle is for cost to follow the event. I hold that since the Claimant is the successful party in this arbitration, the costs of the arbitration be borne by the Respondent.
>
> ...
>
> 267. I have carefully examined and considered the documentary evidence as enclosed in Exhibit A of the Claimant's Closing Submission and Appendix A of the Claimant's Closing Submissions in Reply, together with the factual grounds is support of its cost submissions as presented by the Claimant.
>
> 268. I find and hold that such fees and costs as claimed by the Claimant in the total sum of RM713,958.52, in relation to this arbitration had been reasonably incurred by the Claimant. Its claim is supported by cogent and relevant documentary evidence. The Respondent has not rebutted it.
>
> 269. Based on the above, I find and hold that it the Respondent pay the Claimant the costs of RM713,958.52 incurred arising from and/or relating to the arbitration..

[74] Under these circumstances, SPNB's allegation of breach of the rules of natural justice in connection with the making of the award is completely baseless.

OS NO WA-24C(ARB)-27–07 OF 2022: THE SETTING ASIDE APPLICATION — ORDER

[75] Basically, SPNB relied on the same grounds as in the setting aside application — award in advancing its case for the setting aside application — order.

[76] As a natural consequence of the decision of the court to dismiss the setting aside application — award, SPNB has similarly failed to establish a meritorious case for the setting aside application — order. There are no justifiable reasons for the court to set aside the ex parte order dated 9 August 2022.

PRONOUNCEMENT

[77] Based on the aforesaid considerations, both the setting aside application — award and the setting aside application — order were dismissed with costs of RM20,000 and RM10,000, respectively, subject to allocatur.

Applications dismissed.

Reported by Nabilah Syahida Abdullah Salleh